Proskauer

Ninth Circuit Revives Fee Challenge to Salesforce.com 401(k) Plan

Employee Benefits & Executive Compensation Blog on **April 11, 2022**

On Friday, the Ninth Circuit became the first circuit court to rule in a 401(k) plan fee and investment litigation following the Supreme Court's January 2022 decision in *Hughes v. Northwestern University*, 142 S. Ct. 737 (2022). In *Davis v. Salesforce.com, Inc*., No. 21-15867 (9th Cir. Apr. 8, 2022), the Ninth Circuit, without discussing *Hughes*, upheld the viability of the types of claims that *Hughes* reinstated and remanded for further review. A discussion of *Hughes* can be found on our blog here.

The Ninth Circuit's decision in *Davis* addressed whether plaintiffs plausibly alleged that fiduciaries of Salesforce.com's 401(k) plan breached their fiduciary duties by: (i) offering and retaining more expensive share classes of mutual funds despite the availability of lower-cost share classes of the same mutual funds; (ii) offering actively managed funds instead of cheaper index funds; and (iii) offering mutual funds instead of available collective investment trusts.

A federal district court in California previously ruled (twice) that plaintiffs' complaint did not meet the plausibility standard, by: (1) accepting defendants' "obvious explanation" that more expensive share classes were selected because they paid revenue sharing that was in turn used to offset recordkeeping and administrative fees; and (2) concluding that it was improper to compare the two management styles (passive versus active) and investment vehicles (mutual fund versus collective investment trust), and even if the comparisons were appropriate, plaintiffs did not allege long-term and/or material underperformance sufficient to state a plausible claim of imprudence.

In an unpublished opinion, the Ninth Circuit reversed the district court's dismissal of two of the three claims and remanded the case, based on the following conclusions:

First, the Ninth Circuit found it inappropriate to consider, on a motion to dismiss, defendants' argument that the challenged share classes were selected because they made revenue sharing payments to the plan that were used to pay for recordkeeping and administrative services, as opposed to the lower cost share classes that did not pay revenue sharing. The Ninth Circuit explained that where there are two "alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." The Ninth Circuit did not, however, cite to or try to reconcile its holding with its 2018 unpublished decision in *White v. Chevron Corp.*, 752 F. App'x 453 (9th Cir. 2018), in which it upheld the dismissal of similar mutual fund share class claims and appeared to give weight to defendants' alternative explanations by ruling that where there are "two possible explanations, only one of which can be true and only one of which results in liability, plaintiff[] cannot offer allegations that are 'merely consistent with' [its] favored explanation but are also consistent with the alternative explanation. . . . [s]omething more is needed, such as facts tending to exclude the possibility that the alternative explanation is true . . . in order to render plaintiffs' allegations plausible within the meaning of *Iqbal* and *Twombly*."

Second, the Ninth Circuit held that defendants' reasons for not switching from mutual funds to collective trusts, or not doing so sooner, were factual issues not appropriate for resolution at this stage.

Third, the Ninth Circuit found plaintiffs' allegation that defendants should have invested in passively managed funds instead of actively managed funds was *not* sufficient to state a claim, for the same reasons provided by the district court.

Proskauer's Perspective

While the decision is unpublished (and technically non-precedential under Ninth Circuit appellate rules), the Ninth Circuit ruling furthers the increasing concern among plan sponsors and fiduciaries that even the most bare-bones claims challenging the fees and investment offerings of 401(k) plans will withstand motions to dismiss. Of particular concern is the courts' increasing tendency to allow claims challenging the use of higher-cost share classes to proceed, even where the complaint makes no effort to consider the likelihood that these share classes generate revenue sharing payments that offset any higher fees to plan participants. If, at the motion to dismiss stage, courts will refuse to consider even the most obvious explanations for the challenged decisions, defense practitioners may want to consider holding their power on motions to dismiss and instead filing summary judgment motions in the early stages of discovery, when the courts may be more likely to evaluate these explanations.

View Original

Related Professionals

- **Myron D. Rumeld**
  Partner
- **Russell L. Hirschhorn**
  Partner
- **Sydney L. Juliano**
  Associate